LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
JUN 3 19[illegible]
JOHN T. FEY, Clerk

No. 981

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE PITTSTON COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
HARRY BAUM,
MYRON C. BAUM,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:

Appalachian Electric Power Co. v. *United States*, 158 F. Supp. 138	6, 9
Bingham v. *Commissioner*, 195 F. 2d 971	7
Commissioner v. *Goff*, 212 F. 2d 875, certiorari denied, 348 U. S. 829	6, 7, 8
Commissioner v. *Golonsky*, 200 F. 2d 72, certiorari denied, 345 U. S. 939	9
Commissioner v. *McCue Bros. & Drummond, Inc.*, 210 F. 2d 752, certiorari denied, 348 U. S. 829	6, 8, 9
Commissioner v. *P. G. Lake, Inc.*, 356 U. S. 260	7
Commissioner v. *Ray*, 210 F. 2d 390, certiorari denied, 348 U. S. 829	6, 8, 9, 10
Commissioner v. *Starr Bros.*, 204 F. 2d 673	6, 9
Fairbanks v. *United States*, 306 U. S. 436	7
General Artists Corp. v. *Commissioner*, 205 F. 2d 360, certiorari denied, 346 U. S. 866	7, 9
Hale v. *Helvering*, 85 F. 2d 819	7
Hort v. *Commissioner*, 313 U. S. 28	7
Jones v. *Corbyn*, 186 F. 2d 450	7, 10
Leh v. *Commissioner*, 27 T. C. 892	6
McCartney v. *Commissioner*, 12 T. C. 320	6
Millinery Corp. v. *Commissioner*, 350 U. S. 456	9
Roscoe v. *Commissioner*, 215 F. 2d 478	6, 10

Statutes:

	Page
Internal Revenue Code of 1939:	
Sec. 22 (a) (26 U. S. C. 1952 ed., Sec. 22 (a))	2
Sec. 117 (a) (26 U. S. C. 1952 ed., Sec. 117 (a))	2, 6
Internal Revenue Code of 1954, Sec. 1241 (26 U. S. C. 1952 ed., Supp. V, Sec. 1241)	10
Miscellaneous:	
Rev. Rul. 56–531, 1956–2 Cum. Bull. 983	9
S. Rep. No. 1622, 83d Cong., 2d Sess., p. 444 (3 U. S. C. Cong. & Adm. News (1954) 4621, 5087–5088)	10

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 981

THE PITTSTON COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 24–30) is reported at 26 T. C. 967. The opinion of the Court of Appeals (Pet. 12–27) is reported at 252 F. 2d 344.

JURISDICTION

The judgment of the Court of Appeals was entered February 11, 1958. (Pet. 11.) The petition for a writ of certiorari was filed on May 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the cancellation of taxpayer's exclusive contract right to purchase the entire coal output of a designated mine constituted a "sale or exchange",

within the meaning of Section 117 (a) (4) of the Internal Revenue Code of 1939, and thus entitles taxpayer to treat the consideration received for the cancellation as capital gain rather than ordinary income.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

(1) [As amended by Sec. 115 (b). Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable

year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23 (l), or an obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

* * * * *

(4) [As amended by Sec. 150 (a) (1), Revenue Act of 1942, *supra*] *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;

* * * * *

(26 U. S. C. 1952 ed., Sec. 117.)

STATEMENT

This action involves a deficiency in income tax for the taxable year 1949. The Pittston Company and its wholly owned subsidiary, Pattison & Bowns, Inc., filed consolidated returns for that year. The subsidiary, which was the contracting party with Russell Fork Coal Company (hereinafter called Russell) and the recipient of the amount in question, will be referred to as the taxpayer. (Pet. 14.)

On January 25, 1944, taxpayer and Russell entered into a written contract under which Russell agreed to sell to taxpayer or its designee all of the coal mined and sold for resale from the mining plants installed by Russell upon its leased property in Pike County, Kentucky. (Pet. 14–15.) Taxpayer was entitled to a discount of 8% of the gross selling price on all coal purchased by it. This agreement was to continue in force for a period of ten years from its date and for such additional periods as were provided in a separate agreement executed and delivered simultaneously therewith. (Pet. 15–16; R. 25–26.)

On the same date, taxpayer and Russell entered into another written contract under which taxpayer agreed to lend Russell $250,000, such loan to be repaid in periodic installments over a period of ten years and bearing interest at 4% per annum. (Pet. 16.)

Between January 25, 1944, and October 14, 1949, taxpayer purchased from Russell 1,959,563.15 tons of coal for $9,855,089.64, reselling the same at a gross profit of $273,411.14. Taxpayer also carried out its agreement to lend Russell $250,000 and made various additional advances on open account; these loans were liquidated by Russell during 1948. (Pet. 16; R. 26–27.)

On October 14, 1949, Russell paid $500,000 to taxpayer in consideration of the surrender by taxpayer of all its rights under the coal agreement of January 25, 1944. (Pet. 16; R. 27.) The transaction was reflected in a letter agreement dated October 14, 1949, which was sent to Russell by taxpayer and read as follows (Pet. 16; R. 27):

> In consideration of the payment by you to us of the sum of Five Hundred Thousand Dollars ($500,000), receipt of which is hereby acknowledged, it is understood that you have as of this day acquired all of our right and interest in and to the agreement dated January 25, 1944 between us, which agreement provides for the exclusive right by Pattison & Bowns, Inc. to purchase all of the coal produced by you at your Russell Fork Mine, said contract expiring by its terms on January 25, 1954.

In its income tax return for the year 1949, taxpayer reported the $500,000 as long-term capital gain. In his notice of deficiency, the Commissioner determined that this amount "was not received as the result of a sale or exchange and therefore is reportable as ordinary income." The Tax Court held that the $500,000 was taxable as long-term capital gain, not as ordinary income, and overruled the Commissioner. (Pet. 17; R. 27–30.) The Court of Appeals, one judge dissenting, reversed the Tax Court, holding that the transaction of October 14, 1949, resulted in an extinguishment of taxpayer's rights rather than a sale or exchange of property. In the view of the Court of Appeals, the amount received by taxpayer for the cancellation of the contract resulted in the receipt by taxpayer of a sum which it otherwise would have received as ordinary income under the sales contract. (Pet. 17–27.)

ARGUMENT

The question here, arising under the capital gain provisions of the Internal Revenue Code of 1939, is

substantially the same as that presented in three cases in which the Government's petitions for certiorari have been denied. *Commissioner* v. *Goff*, 348 U. S. 829; *Commissioner* v. *Ray*, 348 U. S. 829; *Commissioner* v. *McCue Bros. & Drummond, Inc.*, 348 U. S. 829. Nothing has occurred since denial of certiorari in those cases which warrants further review of this one. On the contrary, Congress has since enacted new provisions, as part of the 1954 Code, designed to narrow the area of controversy in this field. (See discussion, *infra*, p. 10.) The problem presented is thus one of diminishing importance.

1. Under Section 117 (a) (4) of the Internal Revenue Code of 1939 (*supra*, p. 3) "long-term capital gain" is defined as the gain from the "sale or exchange" of capital assets. The Court of Appeals held that the transaction of October 14, 1949, did not result in the sale or exchange of a capital asset, but was a cancellation or extinguishment of taxpayer's rights to purchase coal from Russell under their previous agreement. This view is in accord with numerous decisions sustaining the Commissioner's position in similar circumstances. *Commissioner* v. *Starr Bros.*, 204 F. 2d 673 (C. A. 2d); *Roscoe* v. *Commissioner*, 215 F. 2d 478 (C. A. 5th); *Appalachian Electric Power Co.* v. *United States*, 158 F. Supp. 138 (C. Cls.); *McCartney* v. *Commissioner*, 12 T. C. 320; *Leh* v. *Commissioner*, 27 T. C. 892, now pending on appeal in the Court of Appeals for the Ninth Circuit. See also *General Artists Corp.* v. *Commissioner*, 205 F. 2d

360 (C. A. 2d), certiorari denied, 346 U. S. 866.[1] If the sales contract had been permitted to remain in effect for its full term, taxpayer would have received profits which would have been taxable as ordinary income. The cancellation agreement of October 14, 1949, as the Court of Appeals noted, merely resulted in the receipt by taxpayer of a sum which it might otherwise have realized as ordinary income over the remaining life of the agreement. *Hort* v. *Commissioner*, 313 U. S. 28. Cf. *Commissioner* v. *P. G. Lake, Inc.*, 356 U. S. 260.

2. Taxpayer asserts that the decision below is in conflict with the decision of the Tenth Circuit in *Jones* v. *Corbyn*, 186 F. 2d 450, and the decision of the Third Circuit in *Commissioner* v. *Goff*, 212 F. 2d 875, certiorari denied, 348 U. S. 829.

In *Jones* v. *Corbyn*, *supra*, the taxpayer was an insurance agent who received a lump sum payment for the surrender of his insurance agency. The court held that the transaction represented a sale of a going business since the taxpayer had agreed to turn over to the company his office space and all books, records and files pertaining to the company business. The evidence in that case also indicated that the agency contract and business was worth not less than $45,000.

---

[1] These decisions also agree in principle with this Court's decision in *Fairbanks* v. *United States*, 306 U. S. 436, where it was held that the gain realized from the redemption of bonds prior to maturity did not result from a sale or exchange. See also *Bingham* v. *Commissioner*, 105 F. 2d 971 (C. A. 2d) and *Hale* v. *Helvering*, 85 F. 2d 819 (C. A. D. C.).

In the present case, there was no evidence to indicate the sale of a going business but merely the surrender of a right to purchase a specific commodity, coal.

In *Commissioner* v. *Goff, supra,* a right in specific tangible property, as distinguished from a simple contract right, was involved. In that case, the taxpayer owned some hosiery machines which were used by a hosiery mill under an agreement obligating the latter to pay a fixed sum for their use. The mill later paid taxpayer an agreed sum for the right to use the machines without further charge. The Third Circuit noted (212 F. 2d at 876–877) that the right transferred was "a right connected with the use of specific tangible property, that is, the machines themselves." In the present case no right to specific tangible property is involved; taxpayer merely possessed a naked contract right to purchase coal.

This Court on prior occasions has had the opportunity of appraising the alleged conflict with the two decisions just discussed. In *General Artists Corp.* v. *Commissioner, supra,* and *Commissioner* v. *Goff, supra,* as well as in *Commissioner* v. *McCue Bros. & Drummond, Inc.,* 210 F. 2d 752 (C. A. 2d), certiorari denied, 348 U. S. 829, and *Commissioner* v. *Ray,* 210 F. 2d 390 (C. A. 5th), certiorari denied, 348 U. S. 829, this alleged conflict was asserted and the petitions for writ of certiorari denied. Taxpayer alleges no new factors or considerations which were not previously presented to this Court in its consideration of the prior cases.

3. Taxpayer also asserts that the decision below is in conflict with that of the Fifth Circuit in *Commis-*

sioner v. *Ray, supra.* This claim is erroneous in several respects.

(a) In *Commissioner* v. *Ray, supra,* the court held that a sum received by a tenant as consideration for his release of some of his lessors' obligations under an existing lease represented payment for the sale or exchange of a property interest and was therefore taxable as capital gain. Taxpayer overlooks the fact that the courts have distinguished between the transfer of property interests, such as those of a lessee, and the cancellation of naked contract rights. In the leasehold cases the courts have uniformly held that the lessee's surrender of the lease constitutes a sale or exchange of property. *Commissioner* v. *McCue Bros. & Drummond, supra; Commissioner* v. *Golonsky,* 200 F. 2d 72, certiorari denied, 345 U. S. 939; *Commissioner* v. *Ray, supra.* Cf. *Millinery Corp.* v. *Commissioner,* 350 U. S. 456 (purchase of lessor's reversionary interest by long-term lessee). In the cases involving bare surrender of contract rights, the courts have taken the view that no sale or exchange of property is involved. *Commissioner* v. *Starr Bros., supra; Roscoe* v. *Commissioner, supra; Appalachian Electric Power Co.* v. *United States, supra.* See also *General Artists Corp.* v. *Commissioner, supra.* This distinction has also been recognized by the Commissioner in Rev. Rul. 56–531, 1956–2 Cum. Bull. 983, in which it is stated that amounts received by a tenant for the release of rights in real estate will be recognized as capital gains, but that relinquishment of simple con-

tract rights to ordinary income will not be recognized as involving a sale or exchange of capital assets.

(b) This distinction has, indeed, been applied by the same court which decided *Commissioner* v. *Ray, supra.* Following its decision in *Ray,* the Fifth Circuit decided *Roscoe* v. *Commissioner, supra,* in which it was held that the amount received for cancellation of a real estate sales agency contract was taxable as ordinary income. With respect to simple contract rights such as those involved in the present case, therefore, the position of the Fifth Circuit is in accord with the decision below.

(c) The same distinction has also been recognized in the Internal Revenue Code of 1954. While the provisions of that Code do not control this case, it is noteworthy that Section 1241 of the 1954 Code expressly provides that amounts received by a lessee for the cancellation of a lease or by a distributor of goods for the cancellation of a distributor's agreement (if the distributor has a substantial capital investment in the distributorship) are to be considered capital gains. The 1954 Code, by thus limiting the instances in which transactions involving cancellations of existing agreements may be accorded capital gains treatment, has largely eliminated the basis for future controversy in this field.[7]

---

[7] The Senate Committee report accompanying Section 1241, expressly stated that capital gains treatment was not to be applied to cancellation of agreements such as those involved in *Jones* v. *Corbyn, supra.* S. Rep. No. 1622, 83d Cong., 2d Sess., p. 444, (3 U. S. C. Cong. & Adm. News (1954) 4621, 5087–5088). The present Congressional intent is therefore entirely in accord with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfuily submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
HARRY BAUM,
MYRON C. BAUM,
Attorneys.

JUNE, 1958

U. S. GOVERNMENT PRINTING OFFICE: 1958